Supreme Court, U.S.
FILED
NOV 27 1996

(2)

No. 96-497

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES TAYLOR CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
E. ROY HAWKENS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of a complaint alleging that the Small Business Administration administers the Section 8(a) program of the Small Business Act, 15 U.S.C. 637(a), in a way that awards a disproportionate number of contracts in Arizona to Hispanic-owned firms.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Attorney General v. *Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983)	5
City of Richmond v. *Croson*, 488 U.S. 469 (1989)	6
Eastern Canvas Products, Inc. v. *Brown*, 580 F.2d 675 (D.C. Cir. 1978)	2
Fagan v. *SBA*, 783 F. Supp. 1455 (D.D.C.), aff'd, 19 F.3d 684 (D.C. Cir. 1992)	4
Fordice Construction Co. v. *Marsh*, 773 F. Supp. 867 (S.D. Miss. 1990)	5
J. & L. Parking Corp. v. *United States*, 834 F. Supp. 99 (S.D.N.Y. 1993), aff'd, 23 F.3d 397 (2d Cir. 1994)	4
Liberty Construction, In re, 9 F.3d 800 (9th Cir. 1993)	7
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)	4
Soberal-Perez v. *Heckler*, 717 F.2d 36 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984)	4
United States v. *Hohri*, 482 U.S. 64 (1987)	6
Vallely v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920)	6-7

Constitution, statutes and regulations: Page

U.S. Const. Amend. V 2, 4, 5
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d 2, 3, 4
Small Business Act, 15 U.S.C. 631 *et seq.*:
§ 5(b)(1), 15 U.S.C. 634(b)(1) 7
§ 8(a), 15 U.S.C. 637(a) 1, 2, 3, 4, 6
Tucker Act:
28 U.S.C. 1346(a)(2) 2
28 U.S.C. 1346(b)(2) 6
13 C.F.R. Pt. 124 2
Sections 124.101-124.211 4
Section 124.311 5
Section 124.311(f) 5

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-497

CHARLES TAYLOR CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A2) and the memorandum order of the district court (Pet. App. A3-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for a writ of certiorari was filed on August 21, 1995, and docketed on September 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), establishes a program to foster and promote

business enterprises of socially and economically disadvantaged persons and entities. Under that program, federal agencies contract with the Small Business Administration (SBA) to fulfill qualifying procurement needs. The SBA generally fulfills those needs by subcontracting with SBA-certified, small-business concerns. The SBA generally does not select the specific subcontractor from the pool of eligible participants. That decision is typically made by the procuring agency through competitive bidding. See 13 C.F.R. Pt. 124; Pet. App. A7-A8 (Gov't Motion for Summary Affirmance); see, *e.g.*, *Eastern Canvas Products, Inc.* v. *Brown*, 580 F.2d 675, 677-678 (D.C. Cir. 1978).

Petitioners are an African-American-owned business and its owner. The business, which is licensed to remodel and construct buildings in Arizona, qualifies as an eligible small-business concern under the Section 8(a) program. Petitioners brought this action in the United States District Court for the District of Columbia alleging, as relevant here, that the SBA awards a disproportionate share of contracts in Arizona to Hispanic-owned firms in violation of the Fifth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. See Pet. App. A18-A19. Petitioners requested declaratory relief "prohibiting the disproportionate awarding of contracts to Hispanic owned firms [and directing] a fair, appropriate setting aside of contracts to black owned firms, specifically the [petitioners]." *Id.* at A21. Petitioners also requested monetary damages of $17,298,624.62 under the Tucker Act, 28 U.S.C. 1346(a)(2). See Pet. App. A18, A25. That sum represented profits petitioners claimed they would have earned had they received the

contracts that were awarded to other contractors. *Id.* at A25.

The district court dismissed petitioners' amended complaint. The court ruled that 42 U.S.C. 2000d does not provide a basis for the relief requested by petitioners because "the statute does not apply to federal agencies, such as SBA, that directly provide government benefits." Pet. App. A4. The court also rejected petitioners' constitutional challenge to the SBA's administration of the Section 8(a) program. The court stated that the program does not "guarantee any particular group a proportionate or 'appropriate' share of business" and, in any event, there is "no basis in the law of equality" for a judicial order that directs "'a fair, appropriate setting aside of contracts to black owned firms.'" Pet. App. A4 (quoting Complaint, *id.* at A21). Finally, the court held that it lacked subject matter jurisdiction over petitioners' Tucker Act claim, because the court's statutory authority to consider such claims was limited to amounts not exceeding $10,000. *Ibid.*

Petitioners appealed, and the government moved for summary affirmance. The court of appeals affirmed the dismissal of petitioners' complaint "substantially for the reasons stated by the district court in its order filed October 18, 1994." Pet. App. A1.

ARGUMENT

The court of appeals properly affirmed the district court's dismissal of petitioners' complaint. Petitioners' contentions do not present any issue warranting review by this Court.

1. Petitioners are not entitled to relief under Title VI of the Civil Rights Act, 42 U.S.C. 2000d. Section 2000d provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As the Second Circuit has explained, Section 2000d does not provide a cause of action against federal agencies, like the SBA, that provide direct government benefits. *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38-41 (1983), cert. denied, 466 U.S. 929 (1984). Rather, it authorizes the federal government "to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government." 717 F.2d at 40 (quoting *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 329 (1978) (Brennan, J., concurring in part)). Accord *J. & L. Parking Corp.* v. *United States*, 834 F. Supp. 99, 104-105 (S.D.N.Y. 1993), aff'd, 23 F.3d 397 (2d Cir. 1994); *Fagan* v. *SBA*, 783 F. Supp. 1455, 1465-1466 n.10 (D.D.C.), aff'd, 19 F.3d 684 (D.C. Cir. 1992). There is no conflict among the courts of appeal on that question.

2. The district court also properly dismissed petitioners' claim for relief under the Fifth Amendment. As an initial matter, petitioners' contention that the SBA awarded a disproportionate amount of business to persons of Hispanic origin misconceives the role of the SBA in administering the Section 8(a) program. The SBA arranges to supply federal agencies with goods and services as a prime contractor, 15 U.S.C. 637(a), and identifies eligible Section 8(a) program participants, 13 C.F.R. 124.101-124.211. When two or

more eligible program participants are able to supply the goods or services, and the contracts meet certain monetary thresholds, the SBA regulations provide for competitive bidding. See 13 C.F.R. 124.311. But contrary to petitioners' understanding, the SBA does not select the subcontract recipients. The SBA's regulations provide that the procuring agencies shall make the awards based on the evaluation criteria set out in the bid solicitation and the Federal Acquisition Regulation. See 13 C.F.R. 124.311(f). Thus, the SBA is not a proper party-defendant for petitioners' discrimination claim, and that fact alone provided an adequate basis for the district court to dismiss petitioners' claims alleging discrimination by the SBA. See Pet. App. A8.

Even if the SBA were a proper defendant, petitioners' complaint failed to allege facts that would establish a violation of the Fifth Amendment's proscription against racial discrimination. Petitioners alleged that the SBA has given a "disproportionate amount of business to Hispanic owned firms." Pet. App. A19. But petitioners did not allege facts demonstrating that petitioners' bids or capabilities were comparable to those of the Hispanic-owned businesses and that petitioners were denied the contracts based on racial considerations. "Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983).[1]

---

[1] Unlike the plaintiff in *Fordice Construction Co.* v. *Marsh*, 773 F. Supp. 867 (S.D. Miss. 1990), upon which petitioners principally relied below (Pet. App. A4), petitioners have made no allegation that the SBA precluded them from

Furthermore, the district court was correct in observing that the relief requested by petitioners—"a declaratory judgment 'prohibiting the disproportionate awarding of contracts to hispanic owned firms [and directing] a fair, appropriate setting aside of contracts to black owned firms'"—has "no basis in the law." Pet. App. A4 (quoting Complaint, *id.* at A21). The Section 8(a) program does not guarantee any particular group a proportionate or "appropriate" share of business, Pet. App. A4, and the imposition of any such broad and rigid quota system would itself raise serious constitutional issues. Cf. *City of Richmond* v. *Croson*, 488 U.S. 469 (1989).

3. Petitioners' Tucker Act claim for contract damages was also properly dismissed. Subject to other limitations not relevant here, a district court's Tucker Act jurisdiction is limited to claims "not exceeding $10,000 in amount," 28 U.S.C. 1346(b)(2). See *United States* v. *Hohri*, 482 U.S. 64, 72 (1987) ("Tucker Act claims for more than $10,000 may be brought only in the United States [Court of Federal Claims].").

In the instant case, petitioners invoked Tucker Act jurisdiction and sought contract-related damages of more than $17,000,000. Pet. App. A18, A25. The district court correctly dismissed petitioners' Tucker Act claim for lack of subject matter jurisdiction, *id.* at A3-A5, and the court of appeals correctly affirmed that ruling, *id.* at A1-A2. Cf. *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353 (1920) ("[c]ourts are constituted by authority and

---

bidding on contracts that they were otherwise capable of performing.

they can not go beyond the power delegated to them").[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
E. ROY HAWKENS
Attorneys

NOVEMBER 1996

---

[2] Petitioners' reliance (Pet. 10) on the Ninth Circuit's decision in *In re Liberty Construction*, 9 F.3d 800 (1993), is misplaced. In that case, the court considered whether the district court had jurisdiction over plaintiff's contract-related claims under the "sue and be sued" provision of the Small Business Act, 15 U.S.C. 634(b)(1). Petitioners did not raise or rely upon the "sue and be sued" provision in the district court. See Pet. App. A15.